Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

SCHOOL DISTRICT NO. 1J,
MULTNOMAH COUNTY, OREGON,

Petitioner,

v.

ACandS, INC., a Pennsylvania corporation, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This case presents an important question under Federal Rules of Civil Procedure 56(c) and (e): What constitutes admissible evidence to avoid summary judgment?

In opposing respondents' summary-judgment motions, petitioner submitted affidavits setting forth evidence sufficient to avoid summary judgment. Nonetheless, and contrary to Celotex Corp. v. Catrett, 477 US 317, 106 SCt 2548, 91 LEd2d 265 (1986), the district court granted summary or partial summary judgment because the evidence was submitted in a form not fully in compliance with Rule 56(e), and the Ninth Circuit Court of Appeals affirmed.

PARTIES TO THE PROCEEDING

The following are the parties: School District No. 1J, Multnomah County, Oregon (petitioner); and Fibreboard Corporation, Keene Corporation, The Flintkote Company, Armstrong Cork Company and Armstrong World Industries, Inc., United States Gypsum Company, and Owens-Corning Fiberglas (respondents). The Court should note that Keene Corporation is in bankruptcy.

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OPINIONS BELOW

The Ninth Circuit's opinion is reprinted in the Appendix. The opinion addressed several issues and parties, not all of which are raised here or subject to

this proceeding. Subsequently, the Ninth Circuit denied rehearing and refused to admit a supplementary affidavit. These decisions are reprinted in the Appendix.

District Judge Helen Frye of the U. S. District Court for the District of Oregon issued opinions stating her reasons for granting summary or partial summary judgment and for refusing to admit the affidavits at issue. The opinions are reprinted in the Appendix.

JURISDICTION

The Ninth Circuit filed its opinion on September 22, 1993. Petitioner timely moved for rehearing. The Ninth Circuit denied rehearing on February 1, 1994. This petition is timely filed within the 90 days mandated in Supreme Court Rules 13.1 and 13.4.

This Court has jurisdiction under 28 USC 1254. The Ninth Circuit had jurisdiction under 28 USC 1291. The district court had jurisdiction under 28 USC 1332.

FEDERAL RULES OF CIVIL PROCEDURE AT ISSUE

Federal Rule of Civil Procedure 56(c) provides in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Federal Rule of Civil Procedure 56(e) provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto

> or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

Petitioner operates public schools in Multnomah County, Oregon (the Portland area). Petitioner sued manufacturers, including respondents, whose asbestos-containing products had been installed in its school buildings. Petitioner alleged claims for negligence, warranty, and strict liability. Jurisdiction in the district court was based upon diversity.

In January 1991, respondents moved for summary or partial summary judgments. In sum, respondents argued petitioner had no evidence their asbestos-containing products had been installed in the school buildings.

In response, petitioner conceded there were buildings in which respondents' asbestos-containing products had not been installed. For these school buildings, petitioner did not contest summary judgment.

But petitioner also submitted affidavits from its attorney, Peter W. Preston, and others contesting summary judgment.[1] Preston stated he had reviewed

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[1] Petitioner submitted affidavits from other individuals like those submitted by Preston. For instance, petitioner submitted an affidavit from a Robert Kramer. Because the affidavits were found objectionable by the district court for the same reason, the argument applicable to the Preston affidavits applies to the other affidavits and will not be repeated.

contract documents on the installation of asbestos-containing products in the school buildings and had identified from the documents which respondent's asbestos-containing products had been installed in which buildings. In addenda to the affidavits, Preston listed which respondent's asbestos-containing product had been installed in which building.

The district court excluded Preston's affidavits under Rule 56(e) because the contract documents were not attached to the affidavits. According to the district court, the absence of the contract documents meant there was no evidence to create genuine issues of material fact.

Another Preston affidavit, separate from those submitted on summary judgment, was submitted to the Ninth Circuit. In a 2-1 vote, the Ninth Circuit refused to consider the later affidavit, which addressed issues raised by respondents on rehearing.

Petitioner moved for reconsideration and submitted the contract documents--all 21,000-plus pages. Petitioner did so, not only to cure what the district court found defective, but also to rebut respondents' contentions that the contract documents could have been changed to substitute a particular respondent's asbestos-containing product with a product from another manufacturer. But the district court denied reconsideration.

The Ninth Circuit, in a 2-1 decision with Judge Ferguson dissenting, affirmed.

REASON AND ARGUMENT FOR GRANTING WRIT

THE NINTH CIRCUIT DECIDED THIS CASE IN A WAY THAT CONFLICTS WITH A DECISION OF THIS COURT.

In Celotex, this Court stated:

> We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment.

> Obviously, Rule 56(e) does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred. 477 US at 324.

In Celotex, this Court indicated the following about opposition to a summary-judgment motion: (1) Except for the "mere pleadings," the nonmoving party may submit evidentiary materials from the "list" in Rule 56(c); and (2) the evidence submitted need not be in a form admissible at trial. See also Hughes v. U.S., 953 F2d 531, 543 (9th Cir 1992) (although facts underlying affidavit must be of type admissible as evidence, affidavit need not be); United States v. Johns-Manville Corp., 259 F Supp 440 (ED Pa 1966) (failure to attach studies and recommendations referred to in

affidavit went to weight of allegations, but did not preclude admissibility).

The list in Rule 56(c) includes affidavits. If the affidavit creates a genuine issue of material fact, summary judgment should be denied.

Celotex also directed the district courts to ignore formal defects in evidentiary materials submitted in opposition to summary judgment. That is what this Court meant by stating the nonmoving party need not produce evidence in a form admissible at trial. Celotex aimed to get to the merits and to dispose of a case, if appropriate, without further ado--to separate the chaff from the wheat, as it were. That can only be done by ignoring formal defects in evidentiary materials, examining what evidence for a claim actually exists, and disposing of the

claim by granting summary judgment or sending it on for trial.

Here, for many of the dismissed claims, there is no doubt evidence exists to avoid summary judgment. Nonetheless, contrary to Celotex, the district court and Ninth Circuit relied upon a formal defect in the evidence--the absence of the contract documents--to grant or affirm the summary or partial summary judgments. That was wrong.

It was wrong because the Preston affidavits set forth evidence sufficient to avoid summary judgment. While the affidavits may not be admissible at trial, and while they do not fully comply with Rule 56(e), still they are "affidavits" within the meaning of Rule 56(c), and they set forth evidence creating genuine issues of material fact. The lower courts were wrong to grant or affirm summary judgment,

see also Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F2d 77, 80 (5th Cir 1987) (noting cases in which evidence was accepted despite "failure to meet the technical requirements of rule 56(e)"); Jackson v. Mississippi, 644 F2d 1142, 1144 (5th Cir 1981) ("Summary judgment is not * * * an automatic sanction for non-compliance with Rule 56(e)"), and this Court should take this opportunity to further delineate the Celotex rule.

CONCLUSION

For the reasons stated, the Court should grant the Petition for Writ of Certiorari.

DATED May 2, 1994.

Respectfully submitted,

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